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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 951.

ROBERT M. MUSE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

I. Negative Deception by Government Agents Held by Appellate Court Not to Be a Misrepresentation.

The government attempts to defend the special agent's failure to disclose the true purpose of his investigation (criminal) by contending: (1) "Petitioner has failed to lay any record basis for his claim that he was deceived. . . ." and (2) "Moreover, petitioner's notion that all investigations conducted by special agents are 'criminal' . . . is imprecise" (Br. in Opp. 4-5).[1] Said contentions,

[1] "Br. in Opp." references are to the government's "Brief in Opposition."

however, are legally insufficient and are not supported by the record.

First, the government's contention that **petitioner** has the burden of proving that his admissions and his consent to produce private records were **not** freely and voluntarily given is erroneous (Br. in Opp. 4-5). This Court has made it very clear that whenever the government relies upon consent, the government has the burden of proving that the consent was, in fact, freely and voluntarily given. The defendant does not have the burden of disproving consent. **Bumper v. North Carolina**, 88 S. Ct. 1788, 1792.

Further, as shown in petitioner's original petition for certiorari (Pet. 6-7) and in the government's Brief in Opposition (Br. in Opp. 3-4), the special agent knew that petitioner had understated his income when he first asked petitioner to prepare the expense analyses. However, the special agent **told** petitioner that "he wanted taxpayer to prepare some expense analyses to enable the agents to determine **whether or not he had understated his income**" (Tr. 16, Emphasis added). Thus, the record is clear that there was, in fact, affirmative deception by the special agent.

The government's claim that all investigations conducted by special agents are not criminal is quite surprising and certainly not supported by the record as far as this case is concerned. Special Agent McGuire testified that his duty was to investigate the criminal prosecutions (Tr. 24). Also, he testified that at the time of the first meeting with petitioner he knew that petitioner had understated his income, but did not know the amount of said understatement (Tr. 16-17). Clearly, petitioner was under criminal investigation from the first moment he met with Special Agent McGuire, if not before.

Additionally, the government's claim that it should not tell a prospective defendant in a criminal case that it is

conducting a criminal investigation for the reason that the agent might subsequently never recommend criminal prosecution is contrary to the teachings of **Miranda v. Arizona**, 384 U. S. 436 and other similarly decided cases. Under the government's rationale, policemen should never warn prospective defendants of their constitutional rights until after the state decides to prosecute. Such an interpretation of **Miranda** sets criminal jurisprudence back many years! We suggest that this court should review the apparent practices by special agents of "negative" deception in cases such as we have here. Further, the resolution of the important issue concerning the government's interpretation of **Miranda** warrants the grant of certiorari in this case.

II. Non-custodial Interrogation of a Defendant by Special Agents Where Inquiry Has Reached the Accusatory Stage Requires Miranda Warnings.

The numerous Federal District Court decisions that are in conflict with the decision below is good reason why this Court should review the practices of the special agents of the Internal Revenue Service in obtaining admissions and records from unknowing suspects.

The government, without giving any policy reasons, urges that special agents should not have to warn a prospective defendant of his right to counsel. Petitioner suggests that there are good reasons why a defendant should be advised of his right to counsel. One reason is so that counsel (assuming no waiver) can advise him of his other legal rights, such as the right to resist administrative summons to produce records. **Reisman v. Caplan**, 375 U. S. 440. Defense counsel might even tell a defendant that he is, in fact, the target of a criminal investigation and possible criminal charges! The government gives no logical reason why this should not be done.

The government claims that this Court's opinion in **Massiah v. United States**, 377 U. S. 201 and other cases cited by petitioner are without relevance here. Although **Massiah** concerned a post-indictment situation, the defendant was not in custody and was not coerced or tricked into giving admissions. The defendant merely misplaced his confidence in the wrong person. See **Hoffa v. United States**, 385 U. S. 293; **Lewis v. United States**, 385 U. S. 206. Thus, the case is relevant to the important issue here.

The government claims that the defendant was in custody in **Windsor v. United States**, 5 Cir., 389 F. 2d 530. However, a close reading of that opinion reveals that defendant was told by the FBI that he was not under arrest nor was he being detained in any way. Thus, the decision in **Windsor** is in direct conflict with the lower Court's decision here.[2]

CONCLUSION.

For all of the reasons advanced, the petition should be granted.

Respectfully submitted,

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[2] Recently, the Federal District Court in the Middle District of Florida concluded that a suspect-witness was entitled to **Miranda** warnings at a grand jury hearing even though he was not in custody. **Lowe v. Carson**, 4 Cr. L. Rep. 2372 (1-10-69).